2608

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 224.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDWARD J. FREEL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF EDWARD FREEL, DECEASED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 10, 1901.

(19016).

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 224.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDWARD J. FREEL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF EDWARD FREEL, DECEASED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the eastern district of New York	1	1
Amended complaint	1	1
Exhibit A.—Contract for the construction of a timber dry dock at the United States Navy-Yard, Brooklyn, N. Y.	7	4
Exhibit B.—Agreement of June 16, 1893	19	10
Exhibit C.—Agreement of August 17, 1893	21	11
Demurrer	24	13
Opinion	25–43	13–23
Order sustaining demurrer	44	23
Final judgment on demurrer	46	24
Petition for writ of error	47	25
Order allowing writ of error	47	25
Assignment of errors	48	25
Certificate of clerk	51	27
Writ of error	52	27
Citation	54	28
Opinion	55	28
Judgment	61	31
Petition for writ of error	63	32
Assignment of errors	65	33
Clerk's certificate	69	35
Writ of error	70	35
Citation	71	36
Proof of service of citation	72	36

23758—01——0

a United States circuit court of appeals for the second circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR, &C., impleaded, defendant in error.

Transcript of record. Error to the circuit court of the United States for the eastern district of New York.

1 Circuit court of the United States for the eastern district of New York.

THE UNITED STATES OF AMERICA
vs.
JOHN GILLIES, HENRY HAMILTON, AND Hugh McRoberts, Catharine Freel, Edward J. Freel, and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased.

The plaintiff, the United States of America, by and through George H. Pettit, United States attorney for the eastern district of New York, as and for an amended complaint, respectfully shows to this court and alleges, upon information and belief:

First. That heretofore and on or about the 17th day of November, 1892, the defendant, John Gillies, entered into a contract and agreement with the plaintiff, whereby the said defendant Gillies did agree to construct a timber dry dock, to be located at the United States navy-yard, Brooklyn, New York, according to certain plans and specifications
2 attached to said contract and made a part thereof, as by reference to said contract, hereto annexed, marked "A," and made a part of this complaint, will more fully appear.

Second. That thereafter and on or about the 16th day of June, 1893, pursuant to and in conformity with paragraph "seventh" of said contract, the said John Gillies and the United States agreed in writing to change and modify the said plans and specifications so as to increase the length of said dry dock from six hundred to six hundred and seventy feet, which said latter agreement or writing is hereto annexed, marked "B," and made part of this complaint.

Third. That thereafter and on or about the 17th day of August, 1893, pursuant to and in conformity with paragraph "seventh" of the contract first above mentioned, the said John Gillies and the plaintiff further agreed in writing to change and modify the plans and specifications annexed to the original contract, which said last-mentioned agreement or writing is hereto annexed, marked "C," and made part of this complaint; the amount specified therein for the additional work thus provided having been first ascertained by a commission duly appointed as required by paragraph "seventh" aforesaid of the first-mentioned contract.

Fourth. And the plaintiff further alleges that on or about the 17th day of November, 1892, the defendants, John Gillies, as principal, and

Henry Hamilton and Hugh McRoberts and one Edward Freel, as sureties, executed their certain bond and obligation, whereby they and their heirs, executors, administrators, and assigns, respectively, jointly and severally became held and firmly bound unto the United States of America in the sum of $123,600; the condition of said bond being that,
3 if the said John Gillies "shall well and truly perform the stipulations of the contract of even date herewith * * agreeing to construct one timber dry dock, to be located at the navy-yard, Brooklyn, N. Y., conforming in all respects to said contract and to the plans and specifications attached thereto, and forming a part thereof, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue." That said bond was given in connection with and as security for the performance of the above-mentioned contracts between defendant Gillies and the United States.

Fifth. That the said defendant Gillies entered upon the performance of said contract and agreements and proceeded with the same up to a certain stage, but before the completion of said contract the said contractor did fail and neglect to go forward with the said contract and agreements and the work thereunder, and did fail and neglect to make satisfactory progress toward the completion of said contracts and the work thereunder within the time specified in the said contract and agreements aforesaid, and within a reasonable time thereafter, from causes within his control, as decided by the Chief of the Bureau of Yards and Docks, and did proceed with the said work under said contract and agreements so slowly, negligently, and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, did declare the said contract forfeited on the part of the said contractor, John Gillies, and the said contractor, John Gillies, was thereupon duly notified of said forfeiture; that immediately thereafter the said Secretary of the Navy appointed a board of competent persons to ascertain and declare a fair market value of all work done and of materials on hand, including a reasonable and customary margin of profit upon the work done satisfactorily, which said board consisted of George C. Remey,
4 Captain, United States Navy; Frank W. Hibbs, assistant naval constructor, United States Navy, and Adolfo J. Menocal, civil engineer, United States Navy; that thereafter the said board made such investigation and appraisal, the said defendant being notified of the sessions thereof and being present in person at the sessions or some of them of said board; that the said board did carefully and diligently examine the work under the said contract done by the said defendant Gillies, and the materials on hand for use in the construction of the same; the said defendant Gillies being given an opportunity by said board to present such evidence as he desired concerning the amount and value of work done by him and the quantity and value of materials on hand, and, after full investigation and careful consideration, the said board did report and find that the fair market value of the work done on the aforementioned dry dock and of the materials on hand for use in the construction of the same, including a reasonable and customary margin of profit upon the work so far as the same had been satisfactorily performed, to be $170,175.40; that said report and findings of the said board were duly approved by the Secretary of the Navy.

Sixth. That thereafter, under the provisions and terms of said contract, the said Secretary of the Navy did proceed to and did complete the said dry dock and appurtenances in accordance with the contracts, plans, and specifications aforesaid, at a cost to the plaintiff, the United States of America, of the sum of $370,000, which sum the said United States of America was compelled to pay for the completion of the work agreed to be performed by the said defendant under the said contract, plans, and specifications aforesaid; that prior to the time when the said contract was declared forfeited the plaintiff had paid to the said defendant Gillies on account thereof the sum of $165,033.34; that by the
5 terms of said agreements between the United States and said defendant Gillies the said defendant Gillies had agreed to perform said work and furnish necessary materials under said contract for the sum of $462,619.18; that by reason of the failure and neglect on the part of the said defendant Gillies to fulfill and perform the terms and conditions of said contract on his part the plaintiff was required to pay the sum of $533,033.34, or $72,414.16 more than the said defendant Gillies, under the said contract, had agreed to perform said work and furnish necessary materials for, which latter sum represents the damages sustained by the plaintiff by reason of the said defendant Gillies' breach of contract as aforesaid.

Seventh. That Edward Freel aforesaid died at the city of Brooklyn on the 24th day of December, 1896, leaving a last will and testament, which was duly admitted to probate by the surrogate of the county of Kings on the 31st day of December, 1896, in and by which he appointed his widow, Catharine Freel, and his sons, Edward J. Freel and Frank J. Freel, executrix and executors of his last will and testament; that all of said persons duly qualified, and letters testamentary were issued to the said defendants, Catharine Freel, Edward J. Freel, and Frank J. Freel, by the said surrogate of the county of Kings, on the 31st day of December, 1896.

Eighth. That the said defendant, John Gillies, neglected and refused to perform the terms and conditions of said contract on his part, in that he failed and neglected to proceed with the said work as before mentioned, and the plaintiff herein has performed, fully and completely, all the terms and conditions of said contract on its part.

Wherefore plaintiff demands judgment against the defendants herein for the sum of seventy-two thousand four hundred and fourteen
6 and 16/100 ($72,414.16) dollars, with interest from April 1st, 1897, together with the costs of this action.

GEORGE H. PETTIT,
United States Attorney for the eastern district of New York.

UNITED STATES OF AMERICA,
Eastern district of New York, ss:

George H. Pettit, being duly sworn, says: That he is the attorney for the United States for the eastern district of New York, and the attorney for the plaintiff in this action; that the allegations contained in the foregoing amended complaint are true to the knowledge of deponent, except as to the matters therein alleged upon information and belief, and as to those matters he believes it to be true; that the grounds of deponent's

belief as to the matters alleged in said complaint on information and belief are information received from the officials of the United States having had connection with the said contract and work, and the original contract, and all papers and correspondence referring to the same.

G. H. PETTIT.

Sworn to before me this 8th day of September, 1898.

RICHARD P. MORLE,
U. S. Commissioner, E. D. of N. Y.

7

A.

Contract for the construction of a timber dry dock to be located at the U. S. Navy-Yard, Brooklyn, N. Y.

This contract of two parts, made and concluded this 17th day of November, A. D. 1892, by and between John Gillies, of the city of Brooklyn, in the State of New York, and hereinafter designated as the contractor, party of the first part, and the United States, represented by Commodore N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part;

Whereas, by advertisement, dated May 12, 1892, proposals were invited by the Chief of the Bureau of Yards and Docks, Navy Department, for the construction by contract of a timber dry dock of the general dimensions, and to be located at the place, therein specified; and

Whereas the proposals of the said contractor, dated July 13, 1892, to construct a timber dry dock to be located at the United States Navy-Yard, Brooklyn, N. Y., for the sum of four hundred and twelve thousand dollars ($412,000), has been duly accepted by the Secretary of the Navy.

Now, therefore, this contract witnesseth: That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided for, the party of the first part, for himself, his heirs and assigns, and his personal and legal representatives, does hereby covenant and agree to and with the United States as follows; that is to say:

First. The contractor will, within twenty days after he shall have been tendered the possession and occupancy of the site by the
8 party of the second part, which possession and occupancy of the said site during the period of construction and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractor by the party of the second part, commence, and within twenty-seven calendar months from such date, construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part; and will, at his own risk and expense, furnish and provide all labor, materials, tools, implements, and appliances of every description, all of which shall be of the best kind and quality adapted for the work as described in the specifications, necessary or requisite in and about the construction of said dry dock and the steel caisson, pumping machinery, pump house, culverts, and all other accessories and appurtenances, in accordance with the aforesaid plans and specifica-

tions, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually agreed and stipulated that the officer or officers, person or persons thus designated shall and may, from time to time during the progress of the work, inspect all materials furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down by and at the expense of the contractor; and that all such rejected material shall be at once removed from the station and replaced by material satisfactory to such inspector, and that all such inferior or unsafe work shall be replaced by satisfactory work, by and
9 at the expense of the contractor. Such inspectors shall at all times during the progress of the work have full access thereto, and the contractor shall furnish them with full facilities for the inspection and superintendence of the same.

It is further mutually stipulated and agreed that at and upon the request of the civil engineer or other officer in charge any disorderly, careless, or incompetent person or persons employed by the contractor in or about the work to be done under this contract shall be at once discharged and not again employed therein; and that all necessary and suitable precautions shall be taken by the contractor during the progress and until the final completion of such work to avoid or prevent accidents; and that the contractor will indemnify and save harmless the party of the second part from all claims against the United States, and from all actions and proceedings at law, and from all costs and damages for or by reason of any injury to person or property resulting from, or directly or indirectly attributable to, any accident or accidents which may occur in or during the prosecution of the work and in connection therewith or any part thereof, or to any carelessness or negligence, wilful or otherwise, of any person or persons employed by the contractor, or to the use of improper or defective materials, or to any act or omission of the contractor prior to the final acceptance of the said dry dock.

Second. The contractor will, at all times during the progress of the work, give his personal supervision and attention to the same and to every part and detail thereof and, in case of his absence, will have a competent representative or foreman present, authorized to act for him in all matters connected with the work and to receive and follow directions relating thereto when given by the civil engineer or other officer in
charge; and for all acts and omissions of such representative or
10 foreman in the premises the contractor shall be responsible.

Third. The contractor will, from time to time, as the same may accumulate during the progress of the work, remove all refuse material and rubbish connected therewith; and any portion of such refuse material or rubbish which the contractor may agree to deposit within the limits of said station shall be so deposited by the contractor, at his own expense, where the commandant may direct, within reasonable distance from the work. On the completion of the work the surroundings shall be thoroughly cleaned up, filled and graded to the established level or levels of

the station as the civil engineer or other officer in charge may direct, and all plant and surplus material and the cofferdam and its fillings shall be removed, by and at the expense of the contractor without unnecessary delay.

Fourth. The contractor stipulates and agrees to remove any and all obstructions at and in front of the entrance of the said dry dock, as per specifications.

Fifth. Insurance to the amount of fifty thousand dollars ($50,000) shall be effected in such manner and in such companies as shall be approved by the Chief of the Bureau of Yards and Docks, which insurance shall be renewed from time to time at the expense of the contractors; the loss, if any, to be stated in the policies as payable to the United States for whom it may concern.

Sixth. The contractor shall hold and save the United States harmless from and against all and every just and legal demand or demands of any nature or kind, for or on account of the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented
11 invention, article, or appliance, which has been or may be adopted or used in or about the construction of the said dry dock, its accessories, and appurtenances, or any part thereof, under this contract, or its use after completion, and to protect and discharge the Government from all liability on account thereof by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy, before final payment under this contract shall be made.

Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation,
12 based upon the estimated actual cost thereof, which the contractor shall receive, if any: Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose; and the contractor shall

be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: And provided also, that no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the party of the second part: And further provided, that no change herein provided for shall in any manner affect the validity of this contract.

Eighth. The aforesaid dry dock and its accessories and appurtenances, and each and every part thereof, shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans, and specifications, to the satisfaction of the party of the second part.

Ninth. In case the completion of the dry dock, its accessories,
13 and appurtenances shall be delayed beyond the said period of twenty-seven calendar months, deductions of fifty dollars per day during the first three months following the expiration of said period and of one hundred dollars per day for each and every day beyond the expiration of the said three months may, in the discretion of the Secretary of the Navy, be made from the contract price of said dry dock; all such deductions to be made from time to time from any payment or payments falling due under the contract: Provided, however, that such delays shall not have been caused by the act of the United States, or its officers or agent, or by fire or water, or by any strike or stand out of workmen employed in or about the work, or by other circumstances beyond the control of the contractor: And provided further, that in case of such alleged delay, the contractor shall give immediate notice thereof to the Secretary of the Navy.

In case any question shall arise under the contract concerning deductions from the contract price of said dry dock, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to the contract.

Tenth. It is mutually understood, covenanted, and agreed, by and between the parties hereto, that the said dry dock shall not be accepted, and that the contractor shall not be entitled to the final payment or to preservations previously made, until twenty days after a complete test of said dock shall have been had under the direction of such officers as may be designated by the party of the second part, such test to consist of a full duty test of the pumping machinery and the docking of such vessels as the party of the second part may direct, the emptying of the dock, the refilling of the dock and the removal of such vessel without any
14 indication whatever of any defect, weakness, or settlement due to faulty material or workmanship in said dock, or either of its accessories, and the results of such test to be in all respects to the full and

complete satisfaction and approval of the officers designated to superintend the same. Such test shall be made within thirty days after the contractor shall have notified the party of the second part of the completion of the dock, and a decision upon the question of acceptance made within twenty days thereafter.

Eleventh. If, at any stage of the work, the contractor shall fail to go forward with the same, or to make satisfactory progress towards its completion within the specified time from causes within his control, as decided by the Chief of the Bureau of Yards and Docks, it shall be optional with the Secretary of the Navy to declare the contract forfeited on the part of the contractor. The contractor shall, upon receiving notice of such forfeiture, be indebted to the United States as for liquidated and ascertained damages in a sum equal to the aggregate of all advance payments made to him for or on account of work done under the contract, and agree to refund the same on demand within sixty days, and that the United States shall hold as collateral for such refund the dock and its appurtenances, or such part or parts as shall have been constructed or furnished. The Secretary of the Navy will thereupon appoint a board of competent persons which shall ascertain and declare the fair market value of all work done and materials on hand, including a reasonable and customary margin of profit upon the work done satisfactorily.

Upon the approval of the findings of said board by the Secretary of the Navy, he may proceed to complete the said dock and appurtenances in accordance with the contract, plans, and specifications, and the title to the dock and appurtenances, or such parts as shall have been completed, and all materials, shall forthwith vest in the United States, and the contractor shall surrender the same, together with the use of the works or plant, and all machinery, tools, and appliances theretofore used or necessary to be used in the completion of the work; any increase in the cost incurred by reason of the failure of the contractor to be at the contractor's expense. If, however, any balance shall appear in favor of the contractor, it shall be paid to and accepted by him in full discharge of all claims under the contract.

In case the said Secretary shall, under the provisions of this clause, declare this contract forfeited, such forfeiture shall not affect the right of the United States to recover for defaults which may have occurred hereunder, and as liquidated damages, the sum of money equal to the penalty of the bond accompanying the same: Provided, however, That if the contractor shall, by any of the causes specified in the ninth clause of this contract, be prevented either from commencing or completing the work at the time agreed upon in this contract, such additional time may, in writing, be allowed him for such commencement or completion as, in the judgment of the Secretary of the Navy, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

Twelfth. The covenants, conditions, and provisions relating to payments under this contract are hereby mutually understood and agreed upon by and between the respective parties as follows—that is to say:

1. The contract price to be paid for the timber dry dock and its acces-

sories and appurtenances, to be constructed in accordance with this contract, shall be four hundred and twelve thousand dollars ($412,000) United States currency.

16 2. The amount of material provided and of work performed by the contractor, monthly, shall be taken as a basis for making payments under this contract, and shall be determined by a fair schedule and classification of prices furnished by the contractor and annexed hereto and forming a part of this contract, the said schedule being subject to change as set forth in the specifications hereto attached and forming part of this contract.

3. The officer in charge shall, on or before the fifth day of each month during the progress of the work, prepare an estimate of the work done and materials furnished and delivered during the month preceding the first day of the month then current, according to the rates specified in the schedule aforesaid, and certify as to the amount properly payable thereunder, which estimate shall be submitted to the commandant of the station where such dock is in course of construction for his approval.

4. When such estimate shall have been approved by the commandant as aforesaid, the respective amounts thereof, less ten per cent, shall be paid through the issuance and delivery to the contractor of bills in triplicate, duly certified by the officer in charge and approved by said commandant and the Chief of the Bureau of Yards and Docks, and every such payment shall be deemed a payment on account of the aforesaid contract price.

5. The reservation of ten per cent on each monthly payment, as above provided for, shall be held until this contract shall have been fully performed by or on the part of the party of the first part, and the said dry dock, its accessories and appurtenances, shall have been finally accepted by the party of the second part; and no monthly or other payment shall be made under this contract except upon approval by the officer in charge of all work done and material furnished at the rates specified in

17 the schedule of prices up to the first of the month previous to the date of such payment, nor without satisfactory evidence, such as a county clerk's certificate, furnished by the contractor to said officer, that there are no existing liens other than that of the United States upon such work or materials at the date of such approval.

6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the contractors, he shall be entitled, within ten days after the filing and acceptance of his claim, to receive the said reserve, and any sums not covered by the monthly estimates, or so much thereof as he may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Chief of the Bureau of Yards and Docks, of all claims of any kind or description under or by virtue of this contract.

Thirteenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of or Delegate to Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; that this contract shall not nor shall any interest therein be transferred by the contractor to any other person or persons, and that any such transfer shall subject the contractor to a forfeiture of his rights hereunder, all

right of action to recover for any breach of this contract being, however, reserved to the United States.

Fourteenth. It is expressly understood, covenanted, and agreed, by and between the parties to this contract, that, if any doubts or disputes arise as to the meaning or requirements of anything in this contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the
18 consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractor to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractor with a full and complete statement of the grounds of his appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require, and the party of the first part hereby binds himself and his heirs and assigns, and his personal and legal representatives, to abide by his, the said Secretary's, decision in the premises.

In witness whereof, the respective parties have hereunto set their hands and seals the day and year first above written.

JOHN GILLIES. [L. S.]
N. H. FARQUHAR, [L. S.]
Chief of the Bureau of Yards and Docks.

Signed and sealed in the presence of—
WILLIAM WILLS.
As to N. H. F.,
A. E. MERRITT.

19 B.

This agreement, entered into this 16th day of June, 1893, between John Gillies, contractor, for the construction of a dry dock at the U. S. Navy-Yard, Brooklyn, New York, party of the first part, and Norman H. Farquhar, Chief of the Bureau of Yards and Docks of the Navy Department, for and in behalf of the United States, party of the second part,

Witnesseth: That, whereas, the Navy Department has decided to lengthen the said dry dock from six hundred (600) feet, as called for in the specifications forming a part of the contract for the construction of a dry dock at the above-mentioned location, entered into by the above-mentioned parties of the first and second parts on the 17th of November, 1892, to six hundred and seventy (670) feet from the outer gate sill to the coping at the head of the dock.

And, whereas, a board of naval officers, consisting of Captain J. N. Miller, U. S. N., Civil Engineer P. C. Asserson, U. S. N., and Civil Engineer F. C. Prindle, U. S. N., was ordered by, and did convene, by order of the Secretary of the Navy, in compliance with the requirements of paragraph 7, page 2, of the contract, to fix this additional compensation to be allowed to said party of the first part for the additional labor and material required for said extension.

And, whereas, said board of naval officers, after careful and mature deliberation, did fix the additional compensation to be paid said party of the first part for the said extension of the said dry dock at forty-five

thousand five hundred and fifty-six ($45,556) dollars, and did allow an extension of three (3) months' time on account of said extension of said dry dock.

Now, therefore, the party of the first part does hereby agree to
20 extend the said dry dock to a length of six hundred and seventy (670) feet, measuring from the outer gate sill to the coping at the head of the dock, in the same manner and under the same conditions as though said extension had been included in the original contract.

And it is further agreed by the party of the first part to accept from the United States, as a just compensation for said work of extension, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars, in full therefor, payment to be made under the same conditions and requirements as exacted by the original contract.

And it is further agreed by the party of the second part that, in full and just compensation to the party of the first part, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars shall be paid for the additional labor and material necessary to extend the said dry dock, as heretofore agreed to, payments to be made under the same conditions and requirements as exacted in the original contract.

And it is therefore agreed that the time fixed in the original contract for the completion of the said dry dock shall be extended three (3) months, on account of the extra labor necessary to carry out the extension of the said dry dock as called for by this agreement.

JOHN GILLIES. [L. S.]
N. H. FARQUHAR, [L. S.]
Chief of the Bureau of Yards and Docks.

Signed and sealed in the presence of—
ANSON S. TAYLOR.
As to N. H. F.,
A. E. MERRITT.

21 DISTRICT OF COLUMBIA, ss:

I, A. S. Taylor, a notary public in and for the District, do hereby certify that John Gillies, party to a certain agreement bearing date the 16th day of June, A. D. 1893, and hereunto annexed, personally appeared before me in the said District. The said John Gillies, being personally known to me, acknowledged the execution of the said agreement to be his act and deed.

Witness my hand and notarial seal this 16th day of June, A. D. 1893.

[SEAL.] A. S. TAYLOR,
Notary Public.

C.

This agreement, made and concluded this seventeenth day of August, A. D. 1893, by and between John Gillies, of the city of Brooklyn, in the State of New York, party of the first part, and the United States, represented by N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part,

Witnesseth: That whereas it has been deemed desirable to change the location of the dry dock now being constructed at the U. S. Navy Yard

at Brooklyn, New York, under contract with the said John Gillies, party of the first part, dated November 17th, A. D. 1892:

Now, therefore, this agreement witnesseth that in consideration of the premises and for and in consideration of the payment to be made as hereinafter provided for, the party of the first part, for himself, his
22 heirs and assigns, and his legal and personal representatives, agrees to and with the United States that he will, in the construction of the said dry dock, change its location to one sixty-four (64) feet further inland than that laid down and staked out when the said contract was entered into, and that he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump house, including the piping, round piles, sheet piles, timber, iron work, excavation, and back filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor.

And this agreement further witnesseth that the United States, party of the second part, in consideration of the stipulations, agrees that for the faithful performance of this agreement by the party of the first part there shall be paid to the said party of the first part the sum of five thousand and sixty-three dollars and eighteen cents ($5,063.18), United States currency, as full compensation. Said payment to be made in accordance with all the terms and conditions of payments as provided in the said contract and specifications.

And the United States further agrees that the time limited by the said contract for the completion of the dry dock shall be extended for a period of eight (8) weeks on account of the said change in the position of the dry dock.

It is also agreed that the provisions and conditions contained in the said contract and the specifications thereto attached, in regard to the character and quality of the materials and workmanship, shall apply to the work as herein modified.

This agreement is made under the provisions of and in accordance with article "seventh" of the said contract.

23 In witness whereof the respective parties have hereunto set their hands and seals the day and year first above written.

JOHN GILLIES. [L. S.]
N. H. FARQUHAR, [L. S.]
Chief of the Bureau of Yards and Docks.

Signed and sealed in the presence of—
P. C. ASSERSON, C. E., U. S. N.
G. H. PERKINS.

(Endorsed:) Amended complaint. Filed September 10, 1898.

24 Circuit court of the United States for the eastern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
JOHN GILLIES, HENRY HAMILTON, HUGH McROBERTS, and Catharine Freel, Edward J. Freel, and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased, defendants.
} Demurrer.

Edward J. Freel, one of the defendants herein, as executor of the last will and testament of Edward Freel, deceased, hereby demurs to the amended complaint herein upon the ground that it appears upon the face thereof that said amended complaint does not state facts sufficient to constitute a cause of action.

Dated, New York, November 16th, 1898.

TRACY, BOARDMAN & PLATT,
Attorneys for Defendant, Edward J. Freel, etc.,
35 Wall Street, New York City.

To Hon. GEORGE H. PETTIT,
Plaintiff's Attorney, Post-Office Building, Brooklyn, New York.

(Endorsed:) Demurrer to amended complaint. Filed November 26, 1898.

25 United States circuit court, eastern district of New York.

UNITED STATES OF AMERICA
vs.
EDWARD J. FREEL, IMPLEADED WITH John Gillies and others.
} February 16, 1899.

Mr. George H. Pettit, Mr. Robert H. Roy, for plaintiff; Mr. James R. Soley, Mr. Howard A. Taylor, for defendant.

Where the release of a contractor's surety from the obligation of a building contract on account of subsequent changes therein, without his consent, is involved, the true meaning and intent of the contract should be ascertained according to usual rules of construction; but when the expressed intention of the parties has been determined, the obligation of the surety is strictissimi juris, from which he is discharged by any alteration of the substantial terms of the contract, whether the same be harmful or beneficial to him. Where the contract authorizes the parties to enter into auxiliary contracts for alterations of the work from that shown in the plans and specifications, without invalidating the primary contract, the parties may stipulate, without releasing the surety, for such enlargement or extension of the work as in nature magnitude and expense would be consistent with and bear a reasonable and subsidiary relation to the work first undertaken.

26 Under such a provision the alteration of the plans and specifications of a contract for the construction of a dry dock for the United States, in consideration of $612,000, so that its length should be 670 rather than 600 feet, with an increased payment of $45,556, and an extension of the time of performance for three months, was within the contemplation of the parties and sureties to the original contract, and the latter were not released thereby. But a supplemental contract changing the location of the entire dry dock from the water side, as provided in the initial contract, to a location sixty-four feet inland, and requiring the contractor to make all necessary excavations and connections with the water at an increased payment of $5,063.18, and with an increased time for performance, released the sureties, inasmuch as all consent of the sureties anticipating changes in the contract related to alterations in the attached plans and specifications, of which the location of the structure was no part.

THOMAS, J.

The question presented on this demurrer is whether the sureties of a contractor who undertook by contract concluded with the United States, on the 17th of November, 1892, in consideration of $612,000, to build a dry dock, "to be located at such place on the water line of the Navy-Yard, Brooklyn, N. Y., as shall be designated," are relieved from liability by reason of a change of such contract by a supplemental agreement concluded between the contractor and the United States, on the 16th day of June, 1893, whereby it was stipulated that the dry dock should be extended to the length of 670 feet, which was 70 feet in excess of the length as originally provided, at an agreed price of $45,556, whereby also "the time fixed in the original contract for the completion of
27 the said dry dock shall be extended three (3) months on account of the extra labor," &c.; or are relieved from liability by reason of an agreement concluded on the 17th of August, 1893, between the contractor and the United States, whereby, in consideration of $5,063.18, to be paid the contractor, it was stipulated to "change its location to one sixty-four (64) feet further inland than that laid down and staked out when the said contract was entered into," and whereby the contractor undertook that "he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid down from the present pump house, including the piping, round piles, sheet piles, timber, ironwork, excavation and back filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor;" whereby, also, "the time limited by the said contract for the completion of the dry dock shall be extended for the period of eight (8) weeks."

The plaintiff answers the contention that the supplementary contracts effect the discharge of the sureties by the claim that such contracts were made pursuant to the seventh article of the contract, whereby the sureties anticipated such contracts and consented thereto. Before considering the seventh article a survey of the applicable law may be obtained by summarizing the holdings.

I. The obligation of the surety is coincident primarily with that of his

principal. Benjamin v. Hillard, 23 How., 149, 164; McCluskey v. Cromwell, 11 N. Y. (1 Kern.), 593, 598; St. Albans Bank v. Dillon, 30 Vt., 122, 126.

II. In estimating the extent of the liability of a surety for the performance of a contract, the true intent, meaning, and fair scope of the contract should be ascertained. U. S. v. Boyd, 15 Pet., 187, 208;
28 Smith v. U. S., 2 Wall., 219, 235; Lee v. Dick, 10 Pet., 482; McCluskey v. Cromwell, 11 N. Y. (1 Kern.), 593, 598; Gates v. McKee, 13 N. Y., 232, 235; Dobbin v. Bradley, 17 Wend., 422, 425; Crist v. Burlingame, 62 Barb., 351, 355; Northern Light Lodge v. Kennedy, 73 N. W. Rep., 524; Wehr v. Ger. Luth. Church, 47 Md., 177, 187; Beers v. Wolf, 116 Mo., 179, 184; Lionberger v. Krieger, 80 Mo., 160; Locke v. McVean, 33 Mich., 473.

III. In ascertaining its true intent, meaning, and scope, the same rules of construction should be employed as are used in the interpretation of other contracts. The extent of the surety's obligation must be determined from the language used, read in the light of the circumstances surrounding the transaction. But when the intention of the parties has thus been ascertained, then the courts carefully guard the rights of the surety and protect him against a liability not strictly within the precise terms of his contract. Leggett v. Humphreys, 21 How., 66, 73; Natl. Mech. Bank Assoc. v. Conkling, 90 N. Y., 116, 121, 122; McCluskey v. Cromwell, 11 N. Y., 593; Crist v. Burlingame, 62 Barb., 351; Ludlow v. Simond, 2 Caine's Cases in Error, 271; Weir Plow Co. v. Walmsley, 110 Ind., 242, 246; Irwin v. Kilburn, 104 Ind., 113; Birdsall v. Heacock, 32 Ohio, 177; Dobbin v. Bradley, 17 Wend., 422, 425; Gamble v. Cuneo, 21 App. Div., 413; People v. Backus, 117 N. Y., 196, 201; Smith v. Molleson, 148 N. Y., 241, 246; Gates v. McKee, 13 N. Y., 232, 237; Belloni v. Freeborn, 63 N. Y., 383; Brandt on Suretyship and Guaranty, sec. 54.

IV. The liability of the surety can not be extended by implication. Miller v. Stewart, 9 Wheat., 680; U. S. v. Boyd, 15 Pet., 187, 208; Smith v. U. S., 2 Wall., 219, 234; U. S. v. Boecker, 88 U. S. (21 Wall.), 652;
U. S. v. American Bonding, &c., Co., 89 Fed. Rep., 925; Dobbin
29 v. Bradley, 17 Wend., 422, 425; Livingston v. Moore, 15 App. Div., 15; Raney v. Baron, 1 Fla., 327; Field v. Rawlings, 6 Ill. (1 Gilm.), 581; Manufacturers' Bank v. Cole, 39 Me., 188; Blair v. Perpetual Ins. Co., 10 Mo., 559; Henderson v. Marvin, 31 Barb. (N. Y.), 297; Grant v. Smith, 46 N. Y., 93, 97.

V. A surety has the right to stand on the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, his liability will be extinguished, even though such alteration be for his own benefit. Miller v. Stewart, 9 Wheat., 680; Miller v. Stewart, 4 Wash., 26; U. S. v. Boecker, 88 U. S., 652, 657; Smith v. U. S., 2 Wall., 219; Martin v. Thomas, 24 How., 315, 317; Reese v. U. S., 9 Wall., 13, 21; U. S. v. Tillotson, 1 Paine, 305, 324; U. S. v. American Bonding &c. Co., 89 Fed. Rep., 925; Earnshaw v. Boyers, 60 Fed. Rep., 528; Ludlow v. Simond, 2 Caine's Cases in Error, 1; U. S. v. Hilligas, 3 Wash., 70; Grant v. Smith, 46 N. Y., 93, 97; Paine v. Jones, 76 N. Y., 274, 279; Page v. Krekey, 137 N. Y., 307, 314; Dobbin v. Bradley, 17 Wend., 422; Bangs v. Strong, 7 Hill, 250; Livingston v. Moore,

15 App. Div. (N. Y.), 15; Mackay v. Dodge, 5 Ala., 388; Bethune v. Dozier, 10 Ga., 235; Taylor v. Johnson, 17 Ga., 521; Weir Plow Co. v. Walmsley, 110 Ind., 242; Mahew v. Boyd, 5 Maryland, 102; Brigham v. Wentworth, 11 Cush. (Mass.), 123; Manufacturers' Bank v. Cole, 39 Me., 188, 193; Simonson v. Grant, 36 Minn., 439; Beers v. Wolf, 116 Mo., 179; Ryan v. Morton, 65 Tex., 258; Wylie v. Hightower, 74 Tex., 306; Bonar v. MacDonald, 3 H. L. Cas., 226, 239; Rees v. Berrington, 2 Vesey, jr., 540.

(*a*) While the authorities state that the surety is relieved, whether the alteration is material or not, Paine v. Jones, Page v. Krekey, Livingston v. Moore, supra, yet it is probable that trivial or very minor changes, relating to detail, and not effecting any substantial change in the terms of the contract will not release the sureties. Grant v. Smith,
30 46 N. Y., 93, 96; U. S. v. Tillotson, 1 Paine (U. S. C. Ct.), 305; Mahew v. Boyd, 5 Md., 102; Weir Plow Co. v. Walmsley, 110 Ind., 242.

(*b*) Changes in the specifications of building contracts fall within this rule. Evans v. Graden, 125 Mo., 72; Beers v. Wolf, 116 Mo., 179.

VI. A variance in the agreement, without the sureties' consent, by a modifying contract, releases the sureties, although the alleged liability is incurred under the original contract. Bonar v. MacDonald, 3 H. L. Cas., 226; Pybus v. Gibb, 38 Eng. Law and Eq., 57.

VII. A contract for new work, by which no new terms are added to the original contract, and whereby the prior contract is in no way embarrassed by greater difficulties of fulfillment, does not release the sureties (Ryan v. Morton, 65 Tex., 258; Barclay v. Deckerhoof, 151 Penn., 375) where the contract for additional work was endorsed on the original contract. See also Warden v. Ryan, 37 Mo. App., 467.

(*a*) The construction by a contractor engaged to build a sewer of 15 additional feet is not a modification of the original contract discharging his sureties, but is a new and additional contract. Fitzpatrick v. McAndrews, 12 Pa. Co. Ct., 353.

VIII. If the primary contract contemplates changes in the work, either in nature or extent, similar to that stipulated in the supplemental contract, the performance whereof will be obligatory upon the contractor, the surety's consent to the secondary contract will be deemed to have been anticipated by his placing himself in the relation of surety to the original contract. Wehr v. German Lutheran Church, 47 Maryland, 177; Village of Chester v. Leonard, 68 Conn., 495; De Mattos v. Jordan, 15 Wash., 378, 386; Northern Light Lodge v. Kennedy,
31 No. Dak. (1879), 73 N. W. Rep.; Beers v. Wolf, 116 Mo., 179; Stewart v. McKean, 110 Exch., 675; Hayden v. Cook, 34 Neb., 670.

(*a*) It is immaterial that the primary contract does not make the execution of the changes obligatory upon the contractor, provided it empower him to make a subsidiary contract for the performance thereof, or contemplate that he may make voluntarily such contract. Northern Light Lodge v. Kennedy, No. Dak. (1879), 73 N. W. Rep.; Beers v. Wolf, 116 Mo., 179, 185.

IX. Where the original contract provides that the agreement for changes shall be in writing, alterations made pursuant to verbal agreements or directions, without the consent of the surety, release him.

Eldridge v. Fuhr, 59 Mo. App., 44; Killoren v. Meehan, 55 Mo. App., 427; Beers v. Wolf, 116 Mo., 179. But see Smith v. Molleson, 148 N. Y., 240.

(*a*) When the contract is to be agreed upon between the superintendent and the parties of the second part, the sureties must be parties to the supplemental agreement if they are formal parties to the first contract. Beers v. Wolf, 116 Mo., 179.

X. Where the original contract provides for making payments to the contractor in certain amounts, a departure from such method of payment may discharge the sureties. The Village of Chester v. Leonard, 68 Conn., 495; Rowan v. Sharp's Co., 33, Conn., 1; Howard Co. v. Baker, 119 Mo., 397; Ryan v. Morton, 65 Tex., 258; Evans v. Graden, 125 Mo., 72; Bragg v. Shain, 49 Cal., 131; Steam Navigation Co. v. Rolt, 6 C. B., N. S., 550; Calvert v. Landon Docks Co., 2 Keen, 638. See De Mattos v. Jordan, 15 Wash., 378; Leavel v. Porter, 52 Mo., 632.

The seventh article, to which reference is made above, is as follows:

32 "Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any: Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or

33 diminished compensation he shall be entitled to receive in consequence of such change or changes. Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock that the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall

revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: And provided also, that no further payment shall be made, unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: And further provided, *that no change herein provided for shall* in any manner affect the validity of this contract."

A characteristic feature of this article is, as well stated by the demurrant, the statute of fraud which it embodies. Its salient and essential purpose was to guard the Government from claims for extra work. This appears repeatedly as the section progresses. The contract is declared to be upon the express condition that the plans and specifications shall not be changed except upon a written order of the Bureau of Yards and Docks, and that if it shall be found "advantageous or necessary" to make any change "in the aforesaid plans and specifications" the same must be agreed upon by the parties to the contract. This is followed by the proviso that, where the increased cost exceeds $500, a board of naval officers shall determine the sum to be paid or deducted from the contract; and the second proviso states "that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction" the same shall be ascertained by a board of naval officers, who shall determine the sum that shall be
34 paid to the contractor for the "additional work that may be required under this contract;" and the third proviso is to the effect that "no further payment shall be made unless the supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part." There is a final proviso that "no change herein provided for shall in any manner affect the validity of this contract."

It is unnecessary to determine whether it would be obligatory upon the contractor to enter into the supplemental contract to which reference is made in this article, however doubtful it may be whether the United States is protected in that regard. Nevertheless, the article does provide a procedure to be observed, should occasion arise, for deduction from, or addition to, the work as prescribed in the plans and specifications, and it is contemplated, at least, that the contractor may enter voluntarily into such a contract, and that such contract shall not affect the validity of the main agreement. Did not the sureties, when reading this provision, discover and understand that such changes might be called for; that the contractor might make a supplemental contract therefor, and that the change stipulated would not invalidate the original contract to which they stood in the relation of parties? Would it be reasonable to hold that the sureties understood, or were fairly justified in understanding, while reading this seventh article, that any changes made pursuant to it would release them from their relation to the original contract, whose continued validity was declared, notwithstanding such changes? Finally, would it be consonant with the intention of the parties, including the sureties, to read into the seventh article a provision that the making of an auxiliary contract without the consent of the sureties

should release them? It is considered that, although the contractor
35 was not by any specific terms obligated to enter into any subsidiary agreement, yet that he might be asked to do so, and that the article contemplated his assent to modifications of the work, without impairing the main obligation or the liability of those who assured its performance. If this be correct, did the contemplated change of the contract justify the agreement for the 70 feet extension of the dock? This presents a grave question, and its solution requires some just rule of general application. Do sureties by consenting to changes involving an enlargement of the work consent to an unlimited extension thereof? Could the dry dock have been doubled in length? If the contract were for a two-story house, could it have been increased to twenty stories? If it were agreed that the material should be of wood, could marble be substituted? Obviously such excessive changes would not be within the thought or the understanding of the parties or the sureties. But a rule of interpretation, otherwise suitable, can not be defeated by showing the absurdity of its unlimited application. All rules operate within reasonable limits, and the court regards their legitimate use and not their abuse. Where a building contract contemplates changes in the work which will bind the sureties for the fulfillment of the contract as modified the changes subsequently made must bear in extent and value some reasonable ratio to the original structure. If the plans and specifications call for a house of particular dimensions and quality, a consent to changes anticipated in the contract should be construed to be limited to changes relevant to, and consistent with, the structure first projected. Changes of such nature, and only such changes, would be anticipated by all the parties to the contract as would be reasonable and cognate to the structure primarily planned and its purpose. In the case at bar, a large dry dock was required by the United States to be located at a principal navy-yard,
36 and it was manifestly intended for the accommodation of all classes of Government vessels. Article seventh manifestly contemplated that changes in its dimensions might be required, and provided for auxiliary contracts for fixing a due consideration for such extension, without disturbing otherwise the continuance of the principal engagement. The subsidiary contract provided for an extension of 70 feet, which was nearly twelve per cent of the length first adopted, at an increased cost of about seven and one-half per cent of the whole consideration. Considering the magnitude of the structure as first intended, and its great expense, and the large use to which it was devoted, the change seems to be such as the parties might have had in view in subscribing to the provisions of the seventh article. The change is a homogeneous and not an incongruous addition, nor even a duplication of parts, as would be the case in multiplying the stories of a house, but it is the mere symmetrical enlargement or extension of a specific thing, the construction of which was undertaken, and such enlargement is not greater than the customary use of a dry dock by the Government might demand in common reason. Although article seven might well have contained clearer provisions for the continued obligation of the sureties and the protection of the Government thereby, yet it seems to admit fairly of the interpretation given.

There have been various judicial expositions of the allowable departure from original plans and specifications, when some change of plans

was contemplated by the original building contract, to some of which reference will be made. Slight and inexpensive departure did not release the sureties. Risse *v.* Hopkins Planing Co. (Kan.), 40 Pac., 904; see cases in opinion; so reasonable alterations that did not materially increase the cost, Consaul *v.* Sheldon, 35 Neb., 247, 52 N. W., 1104; so change of material for the window lintels of a court-house from stone to railroad iron, Howard County *v.* Baker, 119 Mo., 397; so sinking the foundation of a building two or three feet deeper, in the course
37 of repair, Ashenbroedel Club v. Finlay, 53 Mo. App., 256; so enlargement of a church three and a half feet and the change of the material for certain foundations from brick to stone, the court stating that "it is no argument against the construction adopted that there is great difficulty in fixing a limit within which additions and alterations might be made," Wehr v. German Lutheran Church, 47 Md., 177; so even unnecessary alterations, amounting to less than $250, made by direction of the architect, Western Building, &c., Assoc. v. Fitzmaurice, 7 Mo. App., 283; so in the case of a contract to build waterworks, where a line of pipes to be laid in a highway, for a distance of over 2,500 feet, was transferred to private property; another line was changed from one street to another, and considerably lengthened; another line was shifted for a distance of over a mile, so as to be at some points 200 feet from that marked on the original plans; and where the dimensions and length of some of the pipes also varied, so as to call for additional expense on the part of the contract, none of which changes were necessary to the proper fulfillment of the work, Village of Chester v. Leonard, 68 Conn., 495; so in the erection of a building in the city of Fargo, North Dakota, where alterations were made which increased the price $1,000, Northern Light Lodge v. Kennedy, No. Dak. (1879), 73 N. W. Rep.; so the surety on a bond for the faithful performance of a building contract, which provided that the owner should have the right during the progress of the work to make changes and alterations in the building, was not released by the fact that during the progress of the work some changes and additions in the building were made which increased its cost to an inconsiderable extent, Hayden v. Cooke, 34 Neb., 670.

Respecting the change of location of the dry dock a different conclusion is necessary. The contract itself, as distinguished from the plans
38 and specifications, provides that the dock shall be built on the water side, while the supplemental contract expressly changes the location to a point seventy feet from the water side, and provides that the contractor shall do all the excavation and work and furnish all the additional material, necessitated by the change, at an increased remuneration of $5,063.18. The transfer of the site seventy feet from the water side is of itself a distinct departure from the original project. In considering whether this change releases the sureties it should be remembered that broad, liberal, and equitable considerations may not prevail, but rather that the rule is technical and strict. It has been said that sureties are favorites of the law. Ludlow v. Simond, 2 Caine's Cases in Error, 1, 29. It may be said better that the surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of the very terms of that contract. If the principal parties thereto change their agreement there springs into being a new contract

to which the sureties are strangers, and if the guaranty of its performance is desired it must be obtained de novo. Of this a learned judge said as follows: "Now, it must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper measure and effect of the written engagement he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, 'the contract is no longer that for which I engaged to be the surety. You have put an end to the contract I guaranteed, and my obligation, therefore, is at an end.'" Blest v. Brown, 6 L. T., N. S., 620. This holding illustrates the tendency of the rule. In any case, the
39 surety in binding himself to the first contract limited rigidly his liability to that instrument, and its scope measures with precision his undertaking. If he consented to vouch unwisely, he is entitled to suffer to the full measure of his folly without a favorable revision of his liability by the principal. And on the other hand, it is his right to fix the final boundary of his faith in the financial, and in the case of a building contract, the architectural capacity of his principal, and mark out in the agreement whatever method should attend the execution of the work, and the main contracting parties may not add ever so little to the burden which the contractor has assumed, or deviate from the methods which were to accompany its fulfillment. It results from this that he who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however ironbound it may be, for there is for the surety in the enforcement of his bond no equity nor latitude beyond its strict terms. Such is the nature of the implied condition upon which the surety's liability depends.

In the case at bar the plaintiff is bound, when a breach of condition is alleged to plead performance or waiver of the condition, which waiver would be inferred from a consent to the change of location. But this it has failed to do, because from the nature of the case it could not be done. At this juncture the seventh article does not aid. That article consents to changes in the plans and specifications "annexed" to the contract, and the whole article has immediate and sole reference thereto, and does not provide for alteration in the location of the structure itself, which location is no part of the plans and specifications, but has its own distinct place in the contract. Therefore there seems to be no saving clause respecting this change of location, and the case falls within the stern rules which have been presented. Some knowledge of the strict-
40 ness with which the law here involved has been applied may be obtained from a consideration of similar contracts.

In the United States v. Corwine, 1 Bond, 339, 25 Fed. Cases, 671, the principals bound themselves to the United States to open a ship canal three hundred feet wide and twenty feet deep, and keep it open, of such dimensions, for four and a half years from the time of acceptance by the Secretary of War. The principals did not perform their agreement for opening the canal according to its terms, and the Government accepted

the work with a channel only eighteen feet in depth. The sureties of the contractor were released by the change in the terms of the contract.

In the United States v. Tillotson, 1 Paine (Circuit Courts Reports, 305), a person made a contract with the War Department to build a fort, in which it was provided that the fortification was principally, as to the revetment walls, to be built of brick, and thereafter there was an auxiliary contract, by which it was agreed that in place of brick a certain composition called tapia, which was a species of artificial stone formed by a union, in proper porportions, of sharp sand, fresh lime, and oyster shells, with water sufficient to produce adhesion, should be used in such portions of the walls as should be designated by the superintending engineer, and the contractor stipulated to receive $10 for every cubic yard of tapia, instead of $11 for every cubic yard of brickwork as mentioned in the agreement. This was held to be a material alteration and released the contractor's surety.

In The United States v. Case, 25 Int. Rev. Record (U. S. circuit court, 2d cir.), 1879, 56, the guarantors undertook that a bidder for a contract to furnish stone about to be let by the plaintiff, would, in case the contract was awarded to him, enter into the contract with sufficient sureties to furnish the material in conformity to the terms of the advertisement under which the bid was made. It was held, under the facts
41 presented, that the undertaking was that a contract should be executed to furnish stone of a description designated by a sample which was to accompany the proposal, and that the guarantors were released when the bid was to furnish a different kind of stone from certain quarries.

In Mundy v. Stevens, 61 Fed. Rep., 77, sureties for the payment by a contractor to a subcontractor of all moneys received for work under a Government contract as provided in the contract, were released by an alteration of such agreement whereby the right secured to the original contractors to deduct from the monthly payments three cents per yard for material dredged, subsequently was modified so that payments of two and a half cents per cubic yard should be made monthly.

In the United States v. Boecker, 88 U. S., 652, it was held that where a distiller's bond recited that a person is about to be the distiller at one place, to wit, "at the corner of Hudson street and East avenue, situate in the town of Canton," his sureties are not liable for taxes in respect of business carried on by him at another, as "at the corner of Hudson and Third streets" in the same town, even though he had no distillery whatever at the first-named place, about four squares from the last-named place.

In Grant v. Smith, 46 N. Y., 93, it was decided that a change of a contract to purchase a steam engine and two boilers of a given capacity and power, at an agreed price, by which an engine with three boilers and of greater capacity and power was substituted, at an additional price, released the sureties.

In Ludlow v. Simond, 2 Caine's Cases in Error, 271, it was held that where a surety agreed to make good a deficiency in the sale of property at a particular place, he was released if the sale was had at a different place, by order of the agent of the principal.

42 In Rowan v. Sharps, &c., Co., 33 Conn., 1, a contract provided that rifles should be made "with all possible dispatch," but a

supplemental contract, made before performance, provided that three hundred rifles per week should be delivered for a certain period, and six hundred per week afterwards. The surety was discharged.

In Bethune v. Dozier, 10 Ga., 235, the obligee bound himself to furnish eight hundred acres of pine land to furnish stock for a sawmill, and the principal accepted of six hundred and eighty acres in fulfillment of the contract, without the surety's consent, and it was held that the surety was discharged.

In Zimmerman v. Judah, 13 Ind., 286, it was decided a supplementary agreement to put an additional story on a house released the surety for the contractor in the original contract.

In Morgan Co. v. McRea, 52 Kan., 358, the sureties on a bond, conditioned for the erection in accordance with certain plans and specifications, and keeping in repair of bridge abutments, were released from liability by a change in the plans of the work made by the principals and accepted by the obligee of the bond without their knowledge or consent. In the opinion it is said, "the specification as to the west abutment, which is the one that fell, is that it shall be 7 x 20 feet at the base; 3 x 16 feet at the top; 26 feet high, and containing 90 cubic yards. It is definite as to dimensions and form, and calls for a four-sided structure, sloping in presumably on all sides. The structure actually erected and accepted by the plaintiff had wing walls at the ends, the stone of which were interlocked with those of the main part of the abutment. The bond executed by the defendants requires them to keep the work in repair." It was held that to repair such a work was not the same thing as to repair the abutment of the form and dimensions specified in the contract.

43 In Beers v. Wolf, 116 Mo., 187, there was a change of six in. in the depth of the basement, and in the depth of the closets, and these changes made an additional cost in plastering alone of $221.61. The change in the depth of the basement added the cost of a bulkhead to secure sewer connection, and there was a different arrangement of the closets. The primary work was an addition to a hotel, at the price of $31,070. The sureties were released.

In Erickson v. Brandt (Minn.), 55 N. W., 62, it was held that the sureties on a bond of indemnity against liens arising in the course of construction of a building under a contract between the owner and contractor, were released by a departure from the plans and specifications involving different materials and additional labor, which are included in the lien claims.

In Whitcher v. Hall, 5 B. & C., 269 (11 Eng. Com. Law, 225), the surety engaged for another to the plaintiff, for the milking of thirty cows, at a given price each per annum; subsequently an agreement was concluded without the surety's consent, whereby the hirer was to have twenty-eight cows for one-half the year, and thirty-two for the remainder, and it was held that the surety was released.

Pursuant to the foregoing views the demurrer must be sustained.

EDWARD B. THOMAS, *U. S. J.*

44 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial

circuit, held at the United States court rooms in the borough of Brooklyn, on the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present the Honorable Edward B. Thomas, district judge, holding the court.

UNITED STATES OF AMERICA
against
JOHN GILLIES, HENRY HAMILTON, HUGH MCROBERTS and Catharine Freel, Edward J. Freel and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased.

The issue of law raised by the demurrer of the defendant, Edward J. Freel, as executor, to the amended complaint herein, coming on to be heard by the court at a stated term, held by the undersigned on the 3d day of January, 1899, and after hearing James R. Soley, esq., and Howard A. Taylor, esq., of counsel for said defendant Freel, as executor, in support of the demurrer, and George H. Pettit, esq., United States attorney for the eastern district of New York, and Robert H. Roy, esq., assistant United States attorney for said district, in opposition, and due deliberation being had thereon, and it having been found and
45 decided that said amended complaint fails to state facts sufficient to form a cause of action against said Edward J. Freel, as executor, it is

Ordered that said demurrer be sustained and said amended complaint herein as to the defendant, Edward J. Freel, as executor, etc., be dismissed; and that said defendant have leave forthwith to enter final judgment thereon to such effect as aforesaid.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Order. Filed and entered May 24, 1899.

46 United States circuit court for the eastern district of New York.

UNITED STATES OF AMERICA
against
JOHN GILLIES, HENRY HAMILTON, Hugh McRoberts, and Catharine Freel, Edward J. Freel, and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased.

Final judgment on demurrer.

This action having been regularly brought on for trial upon the issues of law formed by the plantiff's amended complaint and by the demurrer of the defendant, Edward J. Freel, as executor, at a stated term of this court, held by the honorable Edward B. Thomas, district judge, who, having heard the parties by their counsel, and, after due deliberation, has duly made and filed an order in writing directing final judgment to be entered to the following effect: Now, on motion of Tracy, Boardman & Platt, attorneys for said defendant, it is

Adjudged and decreed that said demurrer is sustained and the amended complaint herein as to said defendant, Edward J. Freel, as executor, is dismissed.

By the court,

B. LINCOLN BENEDICT, *Clerk.*

Dated, Brooklyn, New York, May 24, 1899.

(Endorsed:) Final judgment on demurrer. Filed and entered May 24, 1899.

47 United States circuit court, eastern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

The United States of America, plaintiff in the above-entitled cause, feeling aggrieved by the judgment of the court entered in the above-entitled action on the 24th day of May, 1899, now comes, by George H. Pettit, the United States attorney for the eastern district of New York, its attorney herein, and petitions the said court for an order allowing the said plaintiff to prosecute a writ of error to the honorable the United States circuit court of appeals for the second circuit, under and according to the laws of the United States in that behalf made and provided.

GEORGE H. PETTIT,
United States Attorney for the Eastern District of New York,
Attorney for Plaintiff,
Post-Office Building, Borough of Brooklyn, New York City.

And now, to wit, on the 26th day of July, 1899, it is ordered that the writ as prayed for be allowed.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Petition for writ of error. Filed July 27, 1899.

48 United States circuit court, eastern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

Assignment of errors.

The above-named plaintiff in error hereby makes the following assignment of errors in the above-entitled action:

That the court erred:

First. In sustaining the demurrer interposed by the defendant, Edward J. Freel, as executor of the last will and testament of Edward Freel,

deceased, to the amended complaint filed in the said action, and by holding and deciding that the facts stated in the said amended complaint were not sufficient to constitute a cause of action, as against said defendant, Edward J. Freel, as executor, as aforesaid.

Second. In holding that the change made by the supplemental contract, set forth in the complaint, dated June 16th, 1893, enlarging the dry dock, was not authorized by the seventh article of the original contract, dated November 17th, 1892, set forth in the said complaint, as respects the
49 testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance of said contract described in said complaint.

Third. In holding that the changes made by the supplemental contract, dated August 17th, 1893, changing the location of the said dry dock sixty-four feet inland, was not authorized by the seventh article of the original contract, dated November 17th, 1892, set forth in the said complaint, as against the testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance of said contract, described in said complaint.

Fourth. In holding that the change made by the said supplemental contracts, set forth in the said complaint, changing the dimensions of said dry dock, as specified in the said original contract, and changing the location of the same, were, respectively, changes in the original contract itself, and not such changes in the plans and specifications accompanying the same, as were authorized by the seventh article of the said original contract, as against the sureties on said bond.

Fifth. In holding that the changes provided for in said two supplemental contracts were material alterations and modifications of the original contract, and therefore released the sureties, on the bond given for the faithful performance of the contract, from all liability on their said bond.

Sixth. In holding that the said original contract was affected and changed by the alteration or location of the dry dock provided for in the said supplemental contracts mentioned in said complaint, and in not holding that said alteration and change of location was merely an alteration of the plans and specifications, and not of said original contract itself.

Seventh. In holding that the extension of time allowed said con-
50 tractor within which to complete the original contract, according to the changes and modifications made in the plans and specifications accompanying the same by said supplemental contracts, affected the liability of the sureties on said bond.

Eighth. In not holding that by article seventh of the original contract, mentioned and described in the said complaint, the extension of said dry dock and the change of location of the same, as provided for in the said two supplemental contracts, were authorized by the said seventh article of said original contract.

Ninth. In not holding that by the provision contained in article seventh of the said original contract, which reads: "And further provided that no change herein provided for shall in any manner affect the validity of this contract," the sureties were apprised and notified beforehand of all changes which the parties might thereafter make in said original contract, and that the said sureties thereby agreed for themselves, respec-

tively, to be bound by such changes as should thereafter be made in said contract, according to the methods therein provided for.

Tenth. In not holding that the sureties on the bond given for the faithful performance of said original contract of said John Gillies, were liable for the faithful performance of the same as changed by the said supplemental contracts of July 16th, 1893, and August 17th, 1893.

GEORGE H. PETTIT,
U. S. Attorney and Attorney for Plaintiff in Error,
Post-Office Building, Borough of Brooklyn, New York City.

(Endorsed:) Assignment of errors. Filed July 27, 1899.

51 UNITED STATES OF AMERICA,
Eastern District of New York, ss.

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, do hereby certify that the foregoing is a true transcript of the amended complaint, demurrer, opinion, orders, and papers on appeal made up to be transmitted to the United States circuit court of appeals for the second circuit, in the case of the United States of America against Edward J. Freel, as executor, etc., impleaded.

In witness whereof I have hereunto set my hand and the seal of this court the 28th day of July, 1899.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

52 UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judges of the circuit court of the United States for the eastern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, or some of you, between the United States of America, plaintiff in error, and Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the second circuit, together with this writ, so that you have the same at the city of New York, in the State of New York, on the 8th day of Aug., 1899, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the borough of Brooklyn,
53 city of New York, the 26th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

Allowed:

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) United States circuit court, eastern district of New York. United States of America, plaintiff in error, v. Edward J. Freel, as executor, &c., defendant in error. Writ of error. George H. Pettit, United States attorney and attorney for plaintiff, post-office building, Borough of Brooklyn. Service of within writ of error and receipt of copy thereof is hereby admitted this 27th day of July, 1899. Tracy, Boardman & Platt, attys. for deft. Received and filed July 27, 1899.

54 The President of the United States of America to Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, and Messrs. Tracy, Boardman & Platt, his attorneys, greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the second circuit, to be held at the city of New York, in the State of New York, on the 8th day of August, 1899, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein the United States of America is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the Borough of Brooklyn, city of New York, this 26th day of July, 1899.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) United States circuit court, eastern district of New York. United States of America, plaintiff in error, v. Edward J. Freel, as executor, &c., defendant in error. Citation on appeal. George H. Pettit, United States attorney and attorney for plaintiff, post-office building, Borough of Brooklyn. Service of within citation on appeal and receipt of a copy thereof is hereby admitted this 27th day of July, 1899. Tracy, Boardman & Platt, attys. for deft. Received and filed July 27, 1899.

55 United States circuit court of appeals for the second circuit, October term, 1899.

Submitted December 5, 1899. Decided January 5, 1900.

THE UNITED STATES, PLAINTIFF in error, *vs.* EDWARD J. FREEL, AS EXECUTOR, etc., defendant in error.	No. 78. Error to the circuit court of the United States for the eastern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

Wallace, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant Freel, as executor of Edward J. Freel, entered upon a demurrer to the complaint. The action

was brought to recover upon a bond executed to the plaintiff by Edward J. Freel as surety for one Gillies, whereby Freel as such surety undertook that Gillies would well and truly perform the stipulations of a contract of even date therewith. It was averred in the complaint that Gillies entered upon the performance of the contract, but thereafter failed and neglected to fulfill it, to the damage of the plaintiff.

The contract referred to in the bond and bearing the same date was executed by Gillies as party of the first part and the United States as party of the second part, and was one by which Gillies undertook to construct a dry dock for the United States at the price of $412,000. The contract contained, among others, the following clauses:

"First. The contractor will, within twenty days after he has
56 been tendered the possession and the occupancy of the site by the party of the second part, commence, and within twenty-seven calendar months from such date construct and complete, ready to receive vessels, a timber dry dock to be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. No omission of the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractor shall receive, if any: Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secre-
57 tary of the Navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated, and determined by a

board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: And provided also, that no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the party of the second part: And further provided, that no change herein provided for shall in any manner affect the validity of this contract."

June 16, 1893, a supplemental contract was entered into between Gillies and the United States to lengthen the dry dock from 600 feet, as called for in the specification, to 670 feet. It provided for additional compensation to the contractor of $45,556.

August 17, 1893, a second supplemental contract was entered into between Gillies and the United States. By this contract "the location of the dry dock now being constructed at the United States navy-yard at Brooklyn, N. Y., under contract with the said John Gillies, party of the first part," was changed, and Gillies stipulated to change its location to one sixty-four feet further inland "than that laid down and staked out when the said contract was entered into," and to perform all the additional excavation necessary and supply all the labor and materials incident thereto. By this contract he was to be paid the sum of $5,063.83 as full compensation for the additional work and materials. Freel was not a party to either of the supplementary contracts.

58 The demurrer of the defendant was sustained in the court below upon the ground that Freel was discharged from his obligation as surety for the performance of the contract by the change introduced by the supplementary contract of August 17, 1893, whereby a new location for the dry dock was substituted for the contract location. The very careful and exhaustive opinion of the learned judge who decided the case in the court below renders unnecessary any extended discussion of the questions presented by this appeal.

By the first contract the site of the dry dock was to be on the water line, at some point to be thereafter designated. Its location was to that extent definitely fixed. It was the purpose and purport of the last agreement to change the original location, which was to be "at such a place on the water line" as might be designated by the United States to a place not on the water line, but "sixty-four feet further inland." This change necessarily entailed an increased expense upon the contractor, as was recognized by the extra compensation allowed in the agreement. That it altered the requirements of the first contract in matters of substance is self-evident.

The proposition is elementary that the obligation of a surety does not extend beyond the terms of his undertaking, and when this undertaking is one to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance, without his assent, his liability is extinguished. This proposition is not controverted in the argument for the plaintiff in error, but the contention is that the change which was made in the requirements of the principal contract was within the contemplation of that contract, and therefore was sanctioned by the undertaking of the surety. If the provisions of the principal contract authorized such a change, undeniably the surety assented to it in

advance. The case is reduced to the single question whether the principal contract did authorize the change. This inquiry depends upon the effect of the seventh clause. The most that can be claimed for
59 that clause is that it permits the party of the second part to make any change, alteration, or modification "in the agreement, plans, and specifications," which are referred to as "annexed" and made a part of the contract, and provides that no such change shall in any manner affect the validity of the contract. Whether the clause warrants such a latitudinarian construction as to embrace the extensive departure from the plans and specifications provided for by the first supplemental contract, we do not determine; we are clear that it does not warrant the change made by the last supplemental contract, and that being so, whether the first change was authorized is a question which does not require decision. The plans and specifications mentioned in clause seven are not set forth in the complaint, and we can not doubt they would have been if they purported in the remotest degree to deal with the location of the site. The context shows, however, that the plans and specifications mentioned in the clause are those which relate to the construction of the building, its accessories, and appurtenances.

The supplemental contract does not purport to make any change in the plans and specifications annexed to the original contract. It recites that the location had been "laid down and staked out" when that contract was entered into; and if the location had been shown or referred to in the plans or specifications that recital would have been unnecessary, and one referring to the plans would naturally have been inserted instead.

Undoubtedly it would have been within the contemplation of the original contract to change the location of the dry dock from the place originally laid down and staked out to any other place upon the water line of the navy-yard, which might have been thereafter designated by the United States. The terms of the contract would have warranted such a change, because they provide for the construction of a dry dock at such place on the water line of the navy-yard "as shall be designated" by the United States. Such a change would not have required the "additional
60 excavation necessary at the entrance" mentioned in the supplemental contract and the very considerable incidental extra expense.

We agree with the court below that the alteration extinguished the liability of the surety. The demurrer was correctly decided, and the judgment is affirmed.

George H. Pettitt, for the plaintiff in error.

Howard A. Taylor and James R. Soley, for the defendant in error.

61 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the post-office building in the city of New York, on the 15th day of January, one thousand nine hundred.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR, *vs.* EDWARD J. FREEL, AS EXECUTOR, ETC., defendant in error.	Error to the circuit court of the United States for the eastern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said circuit court be, and it hereby is, affirmed. It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

62 (Endorsed:) United States circuit court of appeals, second circuit. United States *vs.* Edw. J. Freel, as Exr. Order for mandate. United States circuit court of appeals, second circuit. Filed Jan. 20, 1900. William Parkin, clerk.

63 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE LAST will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

To the Honorable RUFUS W. PECKHAM,
Justice Supreme Court of the United States:

The United States of America, the plaintiff in error in the above-named cause, feeling aggrieved by the judgment of the United States circuit court of appeals for the second circuit, filed and entered in the above-entitled action, in the office of the clerk of said circuit court of appeals, on the twentieth (20) day of January, A. D. nineteen hundred, now comes, by George H. Pettitt, the United States attorney for the eastern district of New York, the attorney of the United States of America herein, and petitions the said Supreme Court for an order allowing the said plaintiff to prosecute a writ of error to the honorable, the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided.

(Signed) GEORGE H. PETTITT,
United States Attorney for the Eastern District of New York, Attorney for Plaintiff in Error, Federal Building, Borough of Brooklyn, New York.

And now, to wit, on the 22nd day of Dec., A. D. nineteen hundred, it is ordered that the writ as prayed for be allowed. Dated Dec. 22, 1900.

(Signed) R. W. PECKHAM,
Jus. Sup. Ct., U. S.

64 (Endorsed:) Supreme Court of the United States. United States of America, plaintiff in error, *vs.* Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendants in error. Petition for writ of error. George H. Pettitt, United States attorney for the eastern district of New York and attorney for plaintiff in error. Federal Building, borough of Brooklyn. United States circuit court of appeals, second circuit. Filed Dec. 31, 1900. William Parkin, clerk.

65 Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE LAST will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

Assignment of errors.

The above-named plaintiff in error hereby makes the following assignment of errors in the above-entitled action:

That the court erred:

First. In affirming the judgment of the United States circuit court for the eastern district of New York, sustaining the demurrers interposed by the defendant, Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, to the amended complaint filed in the said action, and by holding and deciding that the facts stated in the said amended complaint were not sufficient to constitute a cause of action as against the defendant, Edward J. Freel, as executor, as aforesaid.

Second. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the change made by the supplemental contract set forth in the complaint, dated June 16th, 1893, enlarging the dry dock was not authorized by the seventh article of the original contract dated November 17th, 1892, set forth in the said complaint as respects the testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance
66 of said contract, described in said complaint, and in affirming the judgment of said United States circuit court for the eastern district of New York herein.

Third. In affirming the judgment of said United States circuit court for the eastern district of New York, holding that the changes made by the supplemental contract, dated August 17th, 1893, changing the location of the said dry dock sixty-four feet inland, was not authorized by the seventh article of the original contract, dated November 17th, 1892, set forth in the complaint, as against the testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance of said contract, described in said complaint.

Fourth. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the change made by the said supplemental contracts, set forth in the said complaint, changing

the dimension of said dry dock as specified in the said original contract, and changing the location of the same, were, respectively, changes in the original contract itself, and not such changes in the plans and specifications accompanying the same as were authorized by the seventh article of the said original contract, as against the sureties on said bond.

Fifth. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the changes provided for in said two supplemental contracts were material alterations and modifications of the original contract, and therefore released the sureties on the bond given for the faithful performance of the contract, from all liability on their said bond.

67 Sixth. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the said original contract was affected and changed by the alteration or location of the dry dock provided for in the said supplemental contracts mentioned in said complaint, and in not holding that said alteration and change of location was merely an alteration of the plans and specifications, and not of said original contract itself.

Seventh. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the extension of time allowed said contractor within which to complete the original contract, according to the changes and modifications made in the plans and specifications accompanying the same, by said supplemental contracts, affected the liability of the sureties on said bond.

Eighth. In not reversing the said judgment of the said United States circuit court for the eastern district of New York, holding that by article seventh of the original contract, mentioned and described in the said complaint, the extension of said dry dock and the change of location of the same, as provided for in the said two supplemental contracts, were authorized by the said seventh article of said original contract.

Ninth. In not reversing the said judgment of the said United States circuit court for the eastern district of New York, holding that by the provision contained in article seventh of the said original contract, which reads, "And further provided that no change herein provided for shall, in any manner, affect the validity of this contract," the sureties were apprised and notified beforehand of all changes which the parties might thereafter make in said original contract, and that the said sureties

68 thereby agreed for themselves, respectively, to be bound by such changes as should thereafter be made in said contract, according to the methods therein provided for.

Tenth. In not holding that the sureties on the bond given for the faithful performance of said original contract of said John Gillies were liable for the faithful performance of the same, as changed by the said supplemental contracts of July 16th, 1893, and August 17th, 1893.

Eleventh. In not reversing the judgment of the said United States circuit court for the eastern district of New York and overruling the demurrer of the said defendant herein, and rendering judgment for the plaintiff herein, according to the prayer of the complaint herein.

(Signed) GEORGE H. PETTITT,

United States Attorney for the Eastern District of New York, and Attorney for Plaintiff in Error, Federal Building, Borough of Brooklyn, New York City.

(Endorsed:) Supreme Court of the United States. United States of America, plaintiff in error, *vs.* Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error. Assignment of errors. George H. Pettitt, United States attorney for the eastern district of New York, and attorney for plaintiff in error. Federal Building, borough of Brooklyn. United States circuit court of appeals, second circuit. Filed Dec. 31, 1900. William Parkin, clerk.

69 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 68 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States, plaintiff in error, against Edward J. Freel, executor, etc., impleaded, defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 3rd day of January, in the year of our Lord one thousand nine hundred and one and of the independence of the United States the one hundred and twenty-fifth.

[SEAL.] WM. PARKIN, *Clerk.*

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the United States circuit court of appeals for the second circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals for the second circuit, before you, or some of you, between the United States of America, plaintiff in error, and Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error, a manifest error hath happened, to the great damage of the said the United States of America, plaintiff in error, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand nine hundred.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

71 UNITED STATES OF AMERICA, *ss:*

To Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein the United States of America is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 22d day of December, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

72 On this twenty-ninth day of December, in the year of our Lord one thousand nine hundred, personally appeared Lloyd M. Howell before me, the subscriber, U. S. commissioner for the eastern district of N. Y., and makes oath that he delivered a true copy of the within citation to James R. Soley, one of the members of the firm of Tracy, Boardman & Platt, attorneys for Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with others, at the office of said firm, No. 35 Wall st., on December 27th, 1900.

LLOYD M. HOWELL.

Sworn to and subscribed the 29 day of December, A. D. 1900.

[SEAL] B. LINCOLN BENEDICT,
U. S. Comr.

Copy received Dec. 27, 1900. Tracy, Boardman & Platt, per W. F. Wood.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Lloyd M. Howell, being duly sworn, says that he is an assistant to the United States attorney in the eastern district of New York; that he is over the age of twenty-one years; that on the twenty-eighth day of

December, in the year 1900, at number 333 Clinton avenue, in the borough of Brooklyn, in the eastern district of New York, he served the within citation upon Edward J. Freel, the executor of Edward Freel, deceased, by delivering to and leaving with said Edward J. Freel, personally, at the time and place aforesaid, a true copy of the within citation. Deponent further says that he knows the person served as aforesaid to be Edward J. Freel, the person mentioned and described in said citation, and the person to whom the said citation is directed.

LLOYD M. HOWELL.

Subscribed and sworn to before me this 29th Dec., 1900.

[SEAL] B. LINCOLN BENEDICT,
U. S. Comr.

73 (Indorsement on cover:) File No. 18016. U. S. C. C. of appeals, 2nd circuit. Term No. 224. The United States, plaintiff in error, vs. Edward J. Freel as executor of the last will and testament of Edward Freel, deceased. Filed January 10th, 1901.

O